No. 2634

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALEDONIAN INSURANCE COMPANY, et al.,
Plaintiffs in Error,

vs.

WILLIAM LEWIS and CLEMENCE L. BLUM, as executors of the last will and testament of S. W. LEVY, deceased,
Defendants in Error.

PETITION FOR A REHEARING ON BEHALF OF DEFENDANTS IN ERROR.

GOODFELLOW, EELLS, MOORE & ORRICK,
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Attorneys for Defendants in Error and Petitioners.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

On behalf of the defendants in error, William Lewis and Clemence L. Blum, executors of the last will and testament of S. W. Levy, deceased,—who have been substituted as parties herein in the place and stead of Mr. Levy, who died pending the appeal —we respectfully ask a rehearing of this cause.

The opinion of the court—if it be permitted to stand—finally disposes of the litigation without a consideration of the merits and solely upon the ground that the propositions upon which the court below based its judgment "were conclusively and finally determined by this court in its former decision". Before the court, on this technical ground, shall finally deny relief to defendants in error—for the nature of the opinion rendered does not permit of any further proceedings in the case in the District Court—we respectfully ask that the grounds of the judgment be again examined.

Before taking up the main argument, it is necessary to advert to two preliminary propositions which appear to us to lie at the foundation of the case, but which, we submit with the greatest respect, have not been accorded their true bearing and effect in the opinion which has been filed. These are:

(1) That the cause of action stated in the second count, which is based upon defendant's *repudiation* of the contract,[1] is an entirely different cause of action from that stated in the third count—which is based upon plaintiff's *performance* of the contract, and under the settled rule in this State, the

[1] The doctrine that the renunciation by the defendant of an executory contract—as distinguished from a mere failure to perform—gives rise to a cause of action without performance by the plaintiff is well settled. See:

Civil Code, sec. 1440;
Canada etc. Co. v. Flanders, 165 Fed. 323;
Golden Co. v. Rapson Co., 188 Fed. 182;
Hale v. Trout, 35 Cal. 229;
Flinn v. Mowry, 131 Cal. 486;
Pierce v. Tennessee Co., 173 U. S. 1, 12;
Lakeshore Ry. Co. v. Richards, 152 Ill. 590; 30 L. R. A. 33.

proof necessary to support a judgment under one of these counts would not support a judgment under the other.

(2) That upon the first trial and appeal, the second count—the "repudiation count"—was not involved, since the trial court charged the jury that the plaintiff "had elected to rely upon his performance";[1a] while upon the last trial and appeal, the third count—which is based upon *performance* — was not involved. *The issues litigated on the two trials and appeals, therefore, were entirely distinct and separate.*

Primarily to a consideration of these points, a word should be said relative to the issues tendered in the various counts of the complaint. The first count has to do only with the salary for the month of April, 1907,[2] and therefore need not be further considered in this branch of the discussion. The second count states a cause of action to recover damage for defendants' repudiation of the contract during the period commencing with May 1, 1907, and ending with March 31, 1908, the date of the termination of the contract.[3] As matter of inducement and for the purpose of showing the circumstances leading up to the repudiation of the contract, the pleader, in this count, adopts and makes part thereof by reference the allegations of the first

[1a] 199 Fed. 410.
[2] Tr. pp. 2-10.
[3] Tr. pp. 10-13.

count.[4] In the third count is set forth the cause of action based upon performance of the contract for the same period covered by the second count, i. e., May 1, 1907, to March 31, 1908.[5] The third count also adopts the allegations of the first count, and, in addition, certain paragraphs of the second, *but not all of the latter.*[6] Among those paragraphs of the second count which are not adopted in the third count is the one—which is so essential in the statement of a cause of action for repudiation of a contract[7]—that by the repudiation the plaintiff *sustained damages* in the sum, etc.[8] The fourth count alleges the payment by plaintiff at the instance and request of defendants, of certain sums representing commissions upon return premiums, and prays for the recovery thereof as upon a *quantum meruit.*

Unlike the rule of procedure which obtains in Washington and in many of the other States, the California law permits the pleading of inconsistent causes of action and defenses, and does not require any election to be made between them.

Rucker v. Hall, 105 Cal. 429;

Stockton etc. Works v. Glen Falls Ins. Co., 121 Cal. 171;

Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 752.

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[4] Tr. p. 10.
[5] Tr. pp. 13-15.
[6] Tr. p. 15.
[7] See case cited in note 1.
[8] Tr. pp. 12, 13; par. XIX. As showing that no cause of action for repudiation of the contract is stated in the third count, we refer to the allegation that "notwithstanding such repudiation" plaintiff continued to perform (Tr. p. 10). This was treating the renunciation as **brutum fulmen** (L. R. 16 Q. B. D. 473).

The reason for this rule, as stated in the opinion of Judge Van Fleet—than whom no one is more familiar with questions pertaining to the state law and procedure—is that "it cannot always be definitely known what theory as represented by the different forms of pleading the evidence in its legal effect will sustain, and a party is not required to hazard his rights to recover on a single cast".[9] Whatever the reasons for the rule may be, however, the rule itself is definitely established in the jurisprudence of this State.

It is equally clear that under our procedure an allegation of performance of a contract will not be sustained by proof of the waiver of performance,[10] or by such a repudiation of the contract as excuses

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[9] Tr. pp. 86, 87.

[10] The renunciation or repudiation of a contract by one party is said to excuse performance by the other. In Lake Shore etc. Co. v. Richards (Ill.), 30 L. R. A. 53, it is said:

"Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his act and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party. And it can make no difference whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that that determination has been reached and is being acted upon."

In Pierce v. Lukens, 144 Cal. 400, 401, it is said:

"'The general principle is, that a party cannot defend himself on the ground of the non-performance on the other side of conditions whose performance he had already notified the other party would have been nugatory. If he declares himself not bound by the contract, he cannot set up failure in either demand or tender.' (Wharton on Contracts, sec. 995; Civ. Code, sec. 1440.) It was said in Hills v. Exchange Bank, 105 U. S. 321: 'It is a general rule that when tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived, or becomes unnecessary when it is reasonably certain that the offer will be refused, that payment or performance will not be accepted.'"

Gray v. Smith (C. C. A., 9th Cir.), 83 Fed. 825.

performance. "*While a sufficient excuse for non-performance,*" *said the Supreme Court of California in Estate of Warner*, 158 Cal. 445,

> "*will often confer upon a party the same rights that he would have had upon performance, the distinction between the two remains a substantial one. 'The rule is fundamental', said this court in Daley v. Russ,* 86 Cal. 114 (24 Pac. 867), '*that the complaint must allege either performance or a valid excuse for non-performance. One is not the same as the other. And if the plaintiff did not perform the contract, but relies upon the consent of the defendants as an excuse, he must set forth the excuse in his complaint.' (See, also, Poheim v. Meyers,* 9 Cal. App. 31, 37 (98 Pac. 65); *Seebach v. Kuhn,* 9 Cal. App. 485, (99 Pac. 723). *If, as is thus held, a party relying upon an excuse for non-performance must allege his excuse in order to have a basis for proof, it necessarily follows that evidence of such excuse will not support a finding that he has performed.*"

In *Canada etc. Co. v. Flanders*, 165 Fed. 323, it was said:

> "*As a matter of pleading, the action for damages for past breaches of particular provisions of the contract is not the equivalent of an action for damages for an anticipated breach of an executory contract, or for damages due to an unlawful renunciation of liability under the contract.*"

Numerous other authorities declare the same rule. See:

Bailey v. Bond, (C. C. A., 9th Cir.) 77 Fed. 410:

"The facts showing waiver must be pleaded."
Los Angeles etc. Co. v. Amalgamated etc. Co.,
156 Cal. 778;
Roche v. Baldwin, 135 Cal. 525;
Seebach v. Kuhn, 9 Cal. App. 489.

The foregoing authorities show that a mere breach of contract by defendant, *accompanied* by performance by plaintiff, forms an entirely different cause of action from one made up of a renunciation or repudiation of the contract by defendant, *unaccompanied* by performance by plaintiff, and that a complaint which states one of these causes of action will not admit of proof or sustain a judgment based on the other. This rule was invoked by the defendants insurance companies at the first trial, at whose request the court charged the jury that plaintiff had elected to rely upon performance of the contract. We quote here the following from the charge:

> "This is an action under a contract, in which the plaintiff seeks to recover from defendants on account of the breach of the contract by defendants. *In such an action plaintiff must prove either performance on his part of the agreement or that he was prevented from performing by the acts of the defendants.* **In this action plaintiff has elected to rely upon his performance.** *Therefore, I instruct you that if, from the evidence, you find that the plaintiff has failed to perform any of the conditions contained in the contract dated March 31, 1906, on his part to be performed, your verdict must be for the defendants in this action."*[11] (199 Fed. 410.)

[11] 199 Fed. 410.

The effect of this instruction, it is clear, was to remove the second count entirely from the case.[11a] It left for determination by the jury the question only whether plaintiff had performed the contract on his part. Under the charge, they could not consider, as a basis for recovery, that the defendants had repudiated the contract. And the plaintiff, in turn—the judgment being in his favor—could not, of course, attack the charge, nor claim that the evidence was sufficient to justify a verdict in his favor under the count based upon the defendants' repudiation of the contract. As said in a somewhat similar case by Judge Van Fleet, delivering the opinion of the Supreme Court of California in *Mattingly v. Pennie,* 105 Cal. 517,

> "defendant (who was the respondent on a former appeal) was not entitled to dispute the * * * correctness of the rulings of the court below, or of the theory on which the case had been submitted to the jury. The verdict being in his favor, he could not assign error; and, on plaintiff's appeal, we were bound to assume the correctness of the instructions given at plaintiff's request. Those instructions, whether correct or otherwise, were binding upon the jury; and plaintiff was entitled to a verdict in accordance with those instructions, if the evidence warranted it. (*Emerson v. Santa Clara County,* 40 Cal. 543; *Aguierre v. Alexander,* 58 Cal. 21, 30; *Declez v. Save,* 71 Cal. 522.) On that appeal, therefore, the only question which we could possibly consider as to the sufficiency of the evidence was whether the evidence was sufficient, *under the*

[11a] The election, if any, made at the first trial, did not, however, preclude plaintiff from relying upon the second count at the second trial (Agar v. Winslow, 123 Cal. 590; Brown v. Fletcher, 182 Fed. 973).

instructions actually given and not objected to by plaintiff, to have supported a verdict in his favor had one been rendered."

The case at bar came to this court upon a writ of error taken out by the *defendants.* It goes without saying that they made no attack upon the above quoted instruction which had been given at their request—nor were they in any position to make any. In their brief in this court they stated: *"The sole question to be determined by this court is whether or not Mr. Levy performed the contract during the second year of its existence."*[12] And on page 6 of the brief it was said: "Upon the trial of the action, counsel for defendant in error stated that he intended to proceed upon the theory of performance on the part of Mr. Levy during the second twelve-month period of the contract. In order to establish a cause of action, *it became necessary for Mr. Levy to prove that he had performed all the covenants and conditions of the contract on his part to be performed."* And in concluding their brief they stated:[13] "The evidence shows conclusively that he did not perform the contract during the period here sued for, *and that therefore he cannot recover in this action."*

Nor was this court, upon the first appeal, at all concerned with whether the judgment could be supported upon the ground that defendants had repudiated the contract. If the plaintiff had not per-

[12] Brief for Plaintiffs in Error on 1st appeal, p. 8.
[13] Brief for Plaintiffs in Error, p. 10.

formed, it was clear under the instructions given to the jury that the case would have to be reversed, regardless of what the evidence as to the repudiation was. Quite consistent with what has been said, there is not a word or line in the opinion relative to the matter of repudiation, but on the contrary it is entirely devoted to a discussion of the proposition that Levy did not perform.

We are now in a position to consider two propositions either of which we believe, should induce the court to grant a rehearing. These propositions are:

1. That the judgment of this court upon the first appeal, being one of reversal, the only matters concluded by the judgment are those which were in terms discussed in the opinion and decided.

2. The issues litigated upon the first trial and appeal were entirely different from those litigated upon the second trial and appeal.

These propositions will now be briefly discussed in the order stated.

I.

THE JUDGMENT OF THIS COURT UPON THE FIRST APPEAL, BEING ONE OF REVERSAL, THE ONLY MATTERS CONCLUDED BY IT ARE THOSE WHICH WERE IN TERMS DISCUSSED IN THE OPINION AND DECIDED.

We respectfully submit that in holding that the "law of the case" as determined on the first appeal precludes plaintiff from recovering, the court over-

looked the distinction between the rule applicable to *reversals,* as distinguished from that applicable to *affirmances.* In *Mutual Life Ins. Co. v. Hill.* 193 U. S. 551, 58 L. Ed., Mr. Justice Brewer delivering the opinion of the Supreme Court thus states the rule:

> *"While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."*

In *Taenzer & Co. v. Chicago etc. Ry. Co.,* 191 Fed. 547 (certiorari denied by the Supreme Court, 50 L. Ed. 640), the Circuit Court of Appeals for the Sixth Circuit used the following language:

> "The rule is too well settled to require more than the merest reference to authority that every question of fact or law which was before a Circuit Court of Appeals upon a writ of error, and decided by its opinion, is conclusively settled both for such court and the court below in further proceedings in the same action, and that the finality of such decision as respects questions actually decided is not affected by the fact that the judgment was one of reversal and direction of new trial. Messenger v. Anderson (C. C. A. 6) 171 Fed. 785, 790, 96 C. C. A.

445. *But, as applied to judgments of reversal where new trials are ordered, the rule of conclusiveness is confined to questions actually decided.*"[14]

Certainly, it cannot be said that the judgment of this court on the first appeal "in terms discussed and decided"—to use the language of the Supreme Court in *Mutual etc. Ins. Co. v. Hill,* 193 U. S. 551, 48 Law Ed. 788; 24 Sup. Ct. 538—the question whether recovery could be had because of defendants' repudiation of the contract. Indeed, there is not a word or a line in the opinion on that subject. Not only is this so, but the question was not even indirectly involved, since, as we have pointed out, the jury were charged that plaintiff could recover, if at all, only under the count based upon performance. The indisputable fact is that the sufficiency of the evidence to justify a recovery upon the ground that defendants repudiated the contract never was presented excepting upon the last trial; and the effect of the opinion is to deny defendants in error the right to have this cause of action even considered thereat.

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[14] It is frequently said in the decisions that the doctrine of the "law of the case" has "nothing to commend it to the favor of the court and its application will not be extended beyond the cases in which it is held to apply" (Beatty, C. J., in Wixson v. Devine, 80 Cal. 389; approved in Mattingly v. Pennie, 105 Cal. 517). It is therefore held by the United States Supreme Court that the rule "does not apply to expressions of opinion on matters the disposition of which was not required for the decision" (Field, J., in Barney v. Winona etc. Co., 117 U. S. 228, Law Ed. 858, 860); and that it "should be confined to questions that were **actually considered and decided,** and it should not be extended so as to embrace dicta or intimations contained in an opinion which may be thought to foreshadow the views of the appellate court on other questions (Thayer, C. J., in Pattillo v. Allen-West etc. Co., 108 Fed. 723, 729).

II.

THE ISSUES LITIGATED AT THE FIRST TRIAL AND UPON THE FIRST APPEAL WERE ENTIRELY DIFFERENT FROM THOSE LITIGATED AT THE SECOND TRIAL AND UPON THE SECOND APPEAL.

In the opinion much emphasis is placed upon the proposition that the evidence at the two trials was substantially the same. In point of fact, additional evidence was introduced at the second trial, which we think was very material.[15] Be that as it may, however, the rule is well settled that if *either the issues or the evidence* presented at the second trial differ from those presented at the first, the "law of the case" has no application. In *Flood v. Templeton,* 152 Cal. 158, in which, after the determination of the first appeal, a change was made in the issues, it was said:

> "While some allegations of fact are common to both pleadings, additional allegations are contained in the amended answer, presenting a different cause of action from that set forth in the complaint involved on the former appeal and calling for entirely different relief. *The rule of the 'law of the case' is only applicable where the same matters which were determined in the previous appeal are involved in the second appeal.*"

In *Ellis v. Witmer,* 148 Cal. 531—which also involved a change in the issues after judgment in the appellate court—the Supreme Court, speaking through Mr. Justice Shaw, used this language:

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[15] We refer to Mr. Conroy's testimony that no demand for the $1000 per month was made during the second year (Tr. p. 82).

> "When on appeal the supreme court remands a case for a new trial or for further proceedings, the law as laid down in its opinion becomes the law of the case, and cannot afterwards be disputed by either of the parties, nor disregarded even by this court, although it may subsequently appear that it was erroneous. But this rule applies to the case, in its subsequent course, only so far as the case then presents the same facts and involves the same principles of law."

Among the numerous other cases which lay down the same rule, the following may be cited:

Esrey v. Southern Pacific Co., 103 Cal. 547;
Moore v. Trott, 162 Cal. 273;
Gould v. Stafford, 101 Cal. 35.

While it is true that in case at bar the pleadings were not amended after the first reversal, nevertheless the case at the second trial—so far as the point under discussion is concerned—stood in precisely the same position as if the pleading had been amended, for entirely new issues were submitted for decision thereat. As we have pointed out, the effect of the court's charge to the jury at the first trial was to entirely remove from their consideration the cause of action based upon defendants' repudiation of the contract. And at the last trial, in pursuance of the conclusion announced by this court upon the first hearing, no claim was made by plaintiff to recover under the third count.[16]

It is, therefore, respectfully submitted that the issues litigated at the two trials and appeals being

[16] Tr. p. 67.

entirely different, the doctrine of the law of the case has no application.

Before concluding this petition, we desire to respectfully call the court's attention to the fact that even if there were no basis whatever for the propositions which have been considered in the preceding pages of this brief, it cannot be successfully claimed that the right to recover under the fourth count was based upon the contract or is affected by the "law of the case". On the contrary, the cause of action therein stated is upon a *quantum meruit,* and we would therefore be entitled to recover thereon entirely apart from the considerations applicable to the contract and which are referred to in the two opinions of the court. Even if there were no other reason, therefore, it is respectfully submitted that a rehearing should be granted, for the reason that though the opinion does not refer to or consider the right of plaintiff to recover under this count, it effectively bars the right of defendants in error to recover thereunder.

With the greatest respect to the court, we submit that enough has been shown to justify a further hearing of the case by the court.

Dated, San Francisco,
May 27, 1916.

Respectfully submitted,

GOODFELLOW, EELLS, MOORE & ORRICK,
Attorneys for Defendants in Error and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys for defendants in error and petitioners herein, and that in my judgment the foregoing petition for a rehearing is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

W. H. ORRICK,
Of Counsel for Defendants in Error and Petitioners.